

Commonwealth of Pennsylvania



DEPARTMENT OF
AGRICULTURE

DEPARTMENT OF
ENVIRONMENTAL PROTECTION

November 8, 2010

Via regulations.gov

Water Docket
U.S. Environmental Protection Agency
Mailcode: 28221T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Attention: Docket ID No. EPA-R03-OW-2010-0736

Re: EPA-R03-OW-2010-0736
Draft Chesapeake Bay Total Maximum Daily Load

Dear Sir or Madam:

The Pennsylvania Department of Environmental Protection and Department of Agriculture (Pennsylvania) appreciate the opportunity to provide comment on the U.S. Environmental Protection Agency's (EPA's) Draft Chesapeake Bay Total Maximum Daily Load (TMDL). Pennsylvania has been an integral partner in Chesapeake Bay restoration efforts since 1983. This leadership derives from the Commonwealth's set of agricultural stewardship firsts, including:

- The first mandatory farm nutrient management plans;
- The first nutrient management program to regulate nitrogen and phosphorus;
- The first EPA-approved regulatory program for concentrated animal feeding operations (CAFOs);
- The first Chesapeake Bay state to permanently preserve 20% (more than 3 million acres) of land in the watershed;
- The first Chesapeake Bay state to meet its goal to plant 3,736 miles of forest buffers by the year 2010. The state has planted a total of 3,894 miles of forest buffers along waterways since 2002; and
- The Commonwealth is home to the largest Conservation Resource Enhancement Program (CREP) in the entire nation. Pennsylvania's CREP delivers more than \$50 million in state and federal assistance and targets key edge-of-stream best management practices (BMPs) to maximize water quality.

While Pennsylvania has been a leader in agricultural stewardship, we also believe that the Chesapeake Bay TMDL must recognize and respect co-equal goals of clean water and economically viable farms; we cannot have one without the other. The TMDL must recognize the reality of the economic hardship that the state and many of its farms (and especially dairy farms) have experienced over the past three years and that are projected to continue to experience over the next one to two years.

In addition, Pennsylvania has provided leadership in programs to reduce nutrient loadings from municipal and industrial wastewater treatment facilities. Pennsylvania's Chesapeake Bay Compliance Plan was developed in 2006 in response to the adoption of new water quality standards established for the Chesapeake Bay. The plan sets forth how almost 200 of the largest point source facilities will achieve reductions based on their contribution to the overall load going to the Chesapeake Bay. Significant wastewater treatment plants, over 0.4 million gallons per day (MGD), were divided into phases by Total Nitrogen (TN) load. The facilities in Phase 1 (63 plants) have 85 percent of the load, those in Phase 2 (47 plants) have 10 percent of the load, and those in Phase 3 (73 plants) have 5 percent of the load.

Significant progress has been made in the implementation of the point source portions of the Compliance Plan. All of the 63 Phase 1 National Pollutant Discharge Elimination System (NPDES) permits are already issued. Forty-three of the facilities will be in compliance by 2011, another 13 will be in compliance by 2012, and the remaining 7 will be in compliance by 2015. NPDES permits for Phase 2 facilities will be issued by the end of this year or early next year. In March 2010, Section 92.8a planning letters were sent to Phase 3 facilities.

As a result of these and other efforts to control the delivery of nutrients and sediment to the Chesapeake Bay from point sources and nonpoint sources, progress has been made to reduce nitrogen and phosphorus pollution of the local waters in the Pennsylvania watershed. According to EPA's current watershed model, the Commonwealth has achieved 28 percent of the total nitrogen reductions needed and 46 percent of the total phosphorus reductions needed. This progress has been made despite the significant amount of nitrogen deposition that occurs, as described in Section 4 of the draft TMDL. Pennsylvania has concerns about this nitrogen source and its inability to address this load because a significant amount of this is generated outside the borders of Pennsylvania.

Pennsylvania will shortly submit a Final Phase 1 Chesapeake Watershed Implementation Plan (WIP) that will provide the necessary reasonable assurance, separate and apart from the TMDL, that the Commonwealth's nutrient and sediment allocations for the Chesapeake Bay will be met. This WIP is being developed with the input of over 150 stakeholders and reflects an equitable cost-effective approach to meeting Pennsylvania's allocations.

In general, Pennsylvania is concerned that EPA's approach to the Draft Chesapeake Bay TMDL is neither practical, equitable, nor cost-effective and could reverse progress in meeting our water quality goals. Although we will provide additional detail to further identify the rationale for our concerns with the draft TMDL, our key issues also include:

- The revised WIP that is being submitted to EPA shows that the Commonwealth gives reasonable assurances that it can meet load allocations at the border. As a non-tidal state, Pennsylvania disagrees with the imposition of "federal backstop measures" in the draft Chesapeake Bay TMDL, including the establishment of individual waste load allocations (WLAs) for all significant point sources, aggregate WLAs for other entities regulated by the NPDES, and aggregate load allocations (LAs) for nonpoint source sectors.

- The primary method of the Commonwealth's efforts to provide reasonable assurances is the continued call for a technology project fund of \$100 million annually that would place innovative projects such as manure to energy digesters on the ground. This project would be funded by the Chesapeake Bay states and the federal government and will provide the necessary assurance that the reductions necessary will be made. Efforts such as this were not adequately considered in the draft TMDL.
- Reasonable assurance is further supported by recent regulatory initiatives, including:
 - Chapter 102, Erosion and Sediment Control regulations to regulate animal heavy use areas and establish requirements for greater than 25 percent cover within 100 feet of a stream;
 - Increased environmental requirements in the Manure Management Manual;
 - A Water Quality Initiative to provide regional compliance and inspection actions for CAFO, stormwater, and agricultural regulatory programs.
- The WLAs proposed in the draft TMDL for wastewater treatment plants would result in a 6 percent additional reduction in TN at an additional cost to Pennsylvania citizens of over \$1 billion. Individual WLAs for all significant point sources will be ineffective.
- The WLAs proposed in the draft TMDL for stormwater sources are not appropriate. The approach of requiring treatment of 100 percent of all urban land with either impervious reductions or retrofits is not practicable or attainable particularly for many older generation towns and cities. The feasibility and cost to attain such reductions is far in excess of the local communities' resources and makes the cost/benefit ratio questionable at best.
- Pennsylvania also has concerns regarding the designation of all unregulated stormwater to be covered by an NPDES permit. For Pennsylvania, expansion of the Municipal Separate Storm Sewer System (MS4) permitting area would mean over 900 new MS4 NPDES permits. The administrative workload for this far exceeds the federal resources currently allocated to Pennsylvania for MS4 stormwater.
- Pennsylvania does not agree with EPA's definition of "urban MS4 lands." Pennsylvania utilizes the definition of "urbanized area" and "MS4" from the federal regulations. Pennsylvania disagrees that the MS4 system includes all lands within in a designated urbanized area.
- Pennsylvania does not agree with the designation of large numbers of animal feeding operations (AFOs) as CAFOs. There are sufficient regulations in place now; what is needed is federal funding and compliance efforts.
- Pennsylvania is concerned with any mandatory requirement for a precision feed management program for dairy operations of any size.

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- Pennsylvania disagrees with requirements for predetermined list of specific BMPs on all types of farming operations as a baseline to meet the TMDL.
- Pennsylvania is concerned that there are significant deficiencies in EPA's Chesapeake Bay Watershed Model and Scenario Builder. These problems relate to nutrient management, continuous no-till, and urban acres issues. The model used to establish the draft TMDL does not take into account all of the agricultural BMPs that have been installed, including those that have not been reported and those that have been under-reported.
- EPA needs to support Pennsylvania's nutrient and sediment trading program, which is now supported by state regulations. It would be counterproductive for EPA to transform Pennsylvania's existing state trading program into EPA's ideal of a program. Pennsylvania maintains that flexibility is important and questions the appropriateness of including definitions and common elements of offset and trading programs as an appendix to a TMDL. If, nonetheless, the appendix remains in the final TMDL, EPA should remove references to sector allocations, more clearly define and use the terms "credit" and "offset," clarify what is meant by "water chemistry variations" and "intermediary segments," replace "sold" with "used" regarding offset or credit tracking, and reconsider the expectation that a state agency or other institutional entity would anticipate annual increased pollutant loading from nonpoint and unpermitted point sources and acquire offsets to cover them.

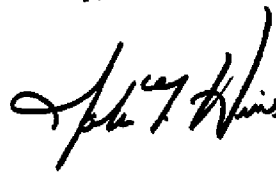
Pennsylvania remains a committed partner in the restoration of the Chesapeake Bay. Given the appropriate flexibility, time, and tools, Pennsylvania is confident that we can help develop a WIP that will make sense to Pennsylvania stakeholders and restore Pennsylvania's local waters and the Chesapeake Bay. The Final Chesapeake Bay TMDL should be consistent with Pennsylvania's final WIP submission and provide gross WLAs and gross LAs for each major basin in the state. Pennsylvania looks forward to a continued dialogue as we move towards achieving our goals of a restored Chesapeake Bay. We appreciate the opportunity to provide comments.

Sincerely,



Michael Pechart
Deputy Secretary
Office of Marketing and Economic Development
Department of Agriculture

Sincerely,



John T. Hines
Deputy Secretary
Office of Water Management
Department of Environmental Protection